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NO. ~~88-6332~~ 89-6332

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1989 TERM

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ROBERT S. MINNICK — PETITIONER

VERSUS

STATE OF MISSISSIPPI — RESPONDENT

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

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QUESTION PRESENTED

PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE ADMISSION OF HIS CONFESSION INTO EVIDENCE.

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BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Mississippi Supreme Court is reported as Minnick v. State, 551 So.2d 77 (Miss. 1988). A copy of this opinion is before this Court as an appendix to the petition for certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C.A. Section 1257(3). He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendment V, VI, VII and XIV.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY:

Petitioner was indicted by the grand jury of the Circuit Court of Clarke County, Mississippi on September 9, 1986 for two counts of capital murder. This indictment was for the robbery and murders of Lamar Lafferty and Donald Ellis Thomas. Minnick was also indicted as an habitual offender. A motion for change of venue was granted and the trial was moved to Lowndes County, Mississippi for trial. The trial began on April 6, 1987. The jury returned a verdict of guilty as charged of both capital murders. At the conclusion of the sentence phase of the trial, on April 9, 1987, the jury returned a sentence of death for each capital murder conviction.

Minnick then took his automatic appeal to the Mississippi Supreme Court raising twenty-one (21) assignments of error. On December 14, 1988, the Mississippi Supreme Court, by an eight to one vote, affirmed the convictions and sentences of death in a written opinion. Minnick v. State, 551 So.2d 77 (Miss. 1988). A timely petition for rehearing was filed by petitioner with the court below. Response by the state was called for and supplemental briefs were also called for by

the Court. On October 25, 1989 the court denied the petition for rehearing without further opinion. From the opinion affirming the convictions and sentences of death petitioner brings this petition for certiorari.

B. FACTUAL HISTORY:

This case began on April 25, 1986 with the escape of Robert Minnick and James "Monkey" Dyess from the Clarke County, Mississippi Jail. Having successfully absconded from the jail Minnick and Dyess hid in the woods over night. In the early afternoon they approached the mobile home of Donald Ellis Thomas in rural Clarke County. They broke into the trailer to look for guns. As the were collecting the guns they found, Thomas returned home accompanied by Lamar Lafferty and his two-year-old son, Brandon Lafferty. Dyess jumped out of the trailer and shot Thomas the back with a shotgun and then in the head with a pistol. Minnick shot Lamar Lafferty. They put the Brandon Lafferty, the two-year-old, on the sofa in the living room of the trailer and continued collecting guns and ammunition in the trailer.

While petitioner and Dyess back inside the trailer another car arrived containing two girls, Marty Thomas, Ellis Thomas' younger sister, and Desiree (B.B.) Beech. Petitioner went out and met them. He was carrying a pistol. Petitioner told the driver to give him the keys and get out of the car if they wanted to live. They were marched to the back of the trailer where they were met by a big black man holding either

shotgun or rifle. They saw Ellis' truck and a Lamar Lafferty's body lying on the ground. Petitioner then took them inside the trailer where he made them lie on their stomachs and tied their hands and feet with haystring. Two-year-old Brandon Lafferty was sitting on the sofa. During this time Dyess was carrying guns out of the bedroom.

Petitioner told Marty and B.B. to tell the police that two black men had committed the crimes. He threatened to return and kill them if they did not tell this story. When all the guns had been removed from the house, petitioner and Dyess left.

The two girls then began attempting to get lose. They finally cut through the string binding their feet with their fingernails and then found a knife in the kitchen to cut their hands loose. They looked out the window, saw that Ellis' truck was gone and saw no one about. The gathered up the baby and got in their car and went to a friends house where they called the police.

Petitioner and Dyess apparently fled to New Orleans, Louisiana as Ellis' truck which was recovered in Florida on May 6, 1986 had New Orleans parking tickets under the seat. Assistance of the New Orleans Police Department was requested in an attempt to locate petitioner and Dyess. The search was fruitless as petitioner and Dyess had left New Orleans for Mexico by bus.

While in Mexico petitioner and Dyess had a disagreement and they parted company. Petitioner hitchhiked to California where he changed his name and procured a birth certificate and drivers license in the name of David Prokaska.

On August 22, 1986 petitioner was arrested in Lemon Grove, California. He was later transferred to the San Diego Police Department. The Mississippi authorities were contacted and Deputy Denham was dispatched to California on August 24, 1986.

Petitioner waived extradition and returned to Mississippi with Denham.

REASONS FOR DENYING THE WRIT

Petitioner's claim that the decision of the Mississippi Supreme Court has created a conflict among the decisions of the state supreme courts on the issue of the application of Edwards v. Arizona is not borne out by a review of the authorities cited by petitioner. The court below correctly held that petitioner waived his right to counsel after he made a limited invocation of his right to counsel. This waiver came after petitioner was furnished counsel and consulted with counsel of two or three occasions. Petitioner was fully aware of his rights when he agreed to speak with the Mississippi authorities. No overreaching occurred in obtaining the statements from petitioner.

Petitioner presents no cognizable claim under the

Constitution or statutes of the United States and therefore certiorari should be denied.

ARGUMENT

PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE ADMISSION OF HIS CONFESSION INTO EVIDENCE.

Petitioner claims that he was denied his rights under the Fifth Amendment and Sixth Amendment when his confession was admitted into evidence thereby violating Edwards v. Arizona, 451 U.S. 477 (1981). His contention is that once he has invoked his right to counsel and been furnished counsel he cane never waive the right to have counsel present when he is interrogated. A recitation of the factual setting of this case will best explain why petitioner validly waived his right to have counsel present when he gave his statement.

On August 22, 1986 petitioner was arrested by the Lemon Grove, California police. The basis of the arrest was the outstanding warrants from Clarke County, Mississippi for two counts of capital murder. Later that day he was transferred to the San Diego Police Department and the Mississippi authorities were notified of his arrest.

On August 23, 1986, unbeknownst to the Mississippi authorities, agents of the Federal Bureau of Investigation interviewed the appellant. During the interview appellant he was advises of his rights however he refused to sign a waiver of rights form. He answered some of the agents questions, but then ceased to answer any more. He told the agents,

"Come back Monday when I have a lawyer." The agents honored his request and ceased interrogation.

Petitioner was furnished an attorney after his request for one. He talked with the attorney two or three times over the weekend. The attorney told Minnick not to talk to anybody, not to tell anybody anything, not to sign any waivers and not to sign any extradition papers.

Deputy Denham from Clarke County, Mississippi arrived in San Diego late in the evening of August 24, 1986. He went to the San Diego jail and requested to see petitioner on the morning of August 25, 1986. Petitioner was brought to an interrogation room and Deputy Denham first advised him of his Miranda rights, however Minnick refused to sign a waiver form. Denham asked him if he wanted to talk about what happened. Instead of telling Denham that he did not want to answer any questions and that he had an attorney, Minnick replied, "Its been a long time since I've seen you." Minnick asked Denham about various folks back in Mississippi including his mother and brother. Denham then asked if Minnick would talk about the escape from the Clarke County jail. Minnick agreed to talk about the escape. This conversation led Minnick to confess his part in the robbery and murder of Thomas and Lafferty.

The trial court held a suppression hearing and held that Minnick's confession was the result of a free and voluntary

waiver of his right to counsel beyond a reasonable doubt.[1]

On direct review the court below in addressing the Fifth Amendment claim held:

> While it is true that Minnick invoked his Fifth Amendment right to counsel, it is also true, by his own admission, that Minnick was provided an attorney who advised him not to speak to anyone else about any charges against him. In this kind of situation, the Edwards bright-line rule as to initiation does not apply. The key phrase in Edwards which applies here is "until counsel has been made available to him." Id. at 485, 101 S.Ct. at 1885. Since counsel was made available to Minnick, his Fifth Amendment right to counsel was satisfied. Therefore, this aspect of Minnick's argument is without merit. [Footnote omitted.]
>
> 551 So.2d at 83.

In response to the Sixth Amendment claim the court below held:

> . . . Minnick continued, freely and voluntarily, to talk about events after the jail escape. This evidence went virtually unrebutted because Minnick, when questioned about whether or not he voluntarily continued to talk about events after the jail escape, refused to testify further, invoking his Fifth Amendment right against self-incrimination.
>
> Under this factual scenario, it is evident that Minnick was aware of his rights, had been advised by an attorney prior to the conversation with Denham, was aware that he did not have to make any statements or answer any questions, and that he made a conscious decision to relinquish his Sixth Amendment right to counsel. The Trial judge so found, and under our often-articulated scope of review, this Court will not disturb a trial judge's findings at a suppression hearing unless manifestly in error or contrary to the overwhelming weight of the evidence.

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[1] While under the federal standard a confession has only to be proved free and voluntary by a preponderance of the evidence, under Mississippi law the standard is beyond a reasonable doubt.

> In so holding, we note that had Minnick at any point during his interview with Denham elected to have assistance of counsel before speaking further, the waiver would have immediately been dissolved. See Patterson v. Illinois, ___ U.S. ___, ___, 108 S.C.t 2389, 23 95, 101 L.Ed.2d 261, 272 (1988), n. 5. However, there is no evidence on the record that Minnick made any such request during Denham's interview. Therefore, we find no error in the lower court admitting the testimony as to Minnick's oral confession at trial. This assignment of error is without merit.
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> 551 So.2d at 85.

At best the invocation of the right to counsel was limited in the case at bar. Petitioner's statement to the F.B.I agents questioning him makes this clear. He stated: "Come back Monday when I have a lawyer." 551 So.2d at 82. Looking to his testimony he stated:

> I told them I had to have a lawyer before I was able to make any statements about anything and I told them I was not signing anything because I had to have a lawyer to talk with before I could talk to any law official.
>
> 551 So.2d at 83, n. 1.

Miranda was not and is not a ruling that makes a defendant a prisoner of his won rights. Here appellant was furnished counsel, he was allowed to consult with counsel, he then chose to waive his right to counsel. He made a free will choice to talk with Deputy Denham, which he could have refused or terminated at any time. The determination of the court below that petitioner waived both his Fifth Amendment and Sixth Amendment rights was correct.[2] The court followed

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[2] Patterson v. Illinois, 487 U.S. ___. 108 S.Ct. ___, 101, L.Ed.2d 261 (1988) clearly held that what ever rights suffice for Miranda's purposes would also be sufficient to

the proper standards set forth in Oregon v. Bradshaw, 462 U.S. 1039 (1983), North Carolina v. Butler, 441 U.S. 369 (1979) and Brewer v. Williams, 430 U.S. 387 (1977) for determining whether or not there has been a waiver of the right to counsel. We must remember that Edwards is only a "prophylactic" rule that serves as an " auxiliary barrier against police coercion." The primary purpose of the rule is to protect an accused from any possible overreaching or coercion on the part of the police. The has been no distinct move to extend the Edwards rule to cases that do not demonstrate untoward conduct on the part of the police. Edwards was a clear case of police overreaching, a fact that is not present in the case at bar. The purpose of Miranda v. Arizona, 384 U.S. 436 (1966) was "to assure that the individuals's right to choose between speech and silence remains unfettered throughout the interrogation process." 384 U.S. at 469. Thus, absent any police overreaching this Court found no constitutional objective that would be served by suppression in this case.

Petitioner would have this Court adopt the draconian approach that once invoked one could never waive his right to have counsel present when he was interrogated no matter what the surrounding factual circumstances showed. He cites the decision of the Georgia Supreme Court in Roper v. State,

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waive ones Sixth Amendment right to have counsel present during interrogation.

375 S.E.2d 600 (Ga. 1989) in support of this premise. If petitioner's reasoning were correct we would not have had the decision in Connecticut v. Barret, 479 U.S. 523 (1987) or Griffin v. Lynaugh, 823 F.2d 856, reh. &'reh. en banc denied, 829 F.2d 1124 (5th Cir. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 1059, 98 L.Ed.2d 1021 (1988). In both those cases the only way that the authorities were able to obtain statements from the defendants was to question the defendants after there had been an invocation of the right to counsel. This invocation was of course held to be limited in both cases as it was in the case at bar.

As was the case in Griffin, the petitioner in this case consulted with his attorney after stating that he would speak to the authorities after he has talked with counsel. In fact he spoke with counsel not once, but twice and maybe three times over the weekend. That was all that he requested. He did not ask that his attorney be present when he was questioned, only that he would have to talk to an attorney before talking any further with the authorities. He consulted with counsel and then waived his presence. He had concluded his conversation with counsel at the time of the confession. This is not the case where petitioner was not allowed to complete his conversation with his counsel. In fact he had either two or three conversations with counsel before he met with Deputy Denham and waived his right to have counsel present. There was no trickery or overreaching by

the state officer. Petitioner was fully aware of his right to have his counsel present.

Petitioner attempts to paint a picture of a conflict of the federal circuits and the state supreme courts as grounds for granting certiorari in this case. He cites the us to the decision of the Seventh Circuit in United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir.), cert. denied sub nom Fairman v. Espinoza, 483 U.S. 1010 (1987), as deciding the issue presented at bar differently than the court below and other federal circuits. Upon reading the opinion it is clear that the argument was not made nor did the Court consider the question of whether the petitioner therein had consulted with counsel and then later waived the presence of counsel.[3] We submit that Espinoza is factually distinguishable from the case at bar.[4] The other cases

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[3] The opinion in Espinoza shows that the petitioner accepted the offer of counsel at an arraignment. This was considered an invocation of counsel for all purposes. The same is not true in the case at bar, Minnick, by his own words stated that he would talk authorities again after he had consulted with counsel.

[4] Petitioner also cites us to United States v. D'Antoni, 856 F.2d 975 (7th Cir. 1988) and United States ex rel. Adkins v. Greer, 791 F.2d 590 (7th Cir. 1986), as further supporting his position of a conflict of the circuits. Neither of these cases are in conflict with principal adopted by the court below. D'Antoni involved a renewed questioning after the defendant had been unsuccessful in reaching his attorney. Adkins involved a question of whether or not one could be impeached with a confession taken in violation of Edwards. Neither of these cases is if conflict with the principle laid down by the Fifth Circuit or the Mississippi Supreme Court. There is not conflict of the circuits.

petitioner cites in an attempt to create a conflict of the circuits are factually distinguishable from the case at bar. They do not involve a question of an arrestee making a limited invocation of his right to counsel and having counsel furnished and then making a statement. In fact, most of the cases are only citing the phrase about "not subject to further interrogation" from Edwards to set the stage for their discussion of the merits of each case. Most often there was no relationship to the quotation and the decision of the case.

Looking to the state cases which petitioner asserts are in conflict with the Mississippi decision in this case we again find he has cited cases that are easily distinguishable on their facts. In fact, in some instances the actual facts are the opposite of that portrayed by petitioner in his brief. Looking to State v. Preston, 555 A.2d 360 (Vt. 1988). Petitioner states that the defendant consulted with counsel before interrogation. The opinion of the Vermont Supreme Court states clearly that the defendant had not consulted with appointed counsel. 555 A.2d at 361. In fact, the Miranda warnings were not even given until forty minutes after the questioning began in that case.

In State v. Perkins, 752 S.W.2d 567 (Mo. App. 1988), the very facts set out by petitioner in his petition clearly distinguish it from the case at bar. There after the defendant requested counsel the police sent an informant in

to question him. There was no furnishing of counsel and the informant did not give the defendant any warning that he had any right to refrain from talking with him. Further, he did not tell the defendant that he was working for the police.

In State v. Hartly, 511 A.2d 80 (N.J. 1986) the opinion of he New Jersey Supreme Court clearly states that counsel was not furnished after the request for one. Likewise, in State v. Warndahl, 436 N.W. 2d 770 (Minn. 1989) counsel was never furnished to the defendant. Further, the defendant initiated the further contact by requesting that the detective come and talk to him.

In People v. Trujillo, 773 P.2d 1086 (Colo. 1989) the defendant made a request for counsel and questioning stopped. The defendant was then released from custody. He was not furnished counsel. When he was arrested some seven weeks later he confessed after waiving his rights. The break in custody was the determining factor in this case.

The only case in which the facts remotely resemble the facts in the case at bar is Bussard v. State, 747 S.W.2d 71 (Ark. 1988). It to differs from the case at bar. When the defendant was arrested in Missouri he hired an attorney. After he was transferred to Arkansas he requested to make a telephone call. He was taken to the Sheriff's office where he made his call. The Sheriff then asked him if he were ready to talk about the crime. He signed a waiver and confessed. The facts in Bussard, differ in that there was no

conditional or limited assertion of the right to counsel. The defendant at no time indicated that he may be willing to talk to the authorities after he consulted with his attorney. In the case at bar the petitioner told the officers to come back on Monday after he had a chance to talk to his attorney and he might talk with them. Clearly there is a difference.

Finally, Roper v. State, 375 S.E.2d 600 (Ga. 1989) is distinguishable on the same ground as Bussard. There was no limited invocation of the right to counsel. While the counsel furnished him was for the purpose of advice on the question of extradition it was not a request limited to that matter. Extradition counsel and Roper did not discuss the substantive crimes, however the attorney told him not to talk to any one before consulting another attorney. The opinion of the Georgia Supreme Court seemed to turn on the fact that there was no limited request for counsel. Here there was a limited request. Petitioner told officers he would talk to them after he had a chance to speak with counsel. While the officer that talked to him did not know of this limited request it was clear that petitioner knew it and that is the operative factor. The intent of petitioner was clearly to speak further with the authorities after he had spoken with an attorney.

There is no clear conflict of the federal circuits or the state supreme courts on this issue. Petitioner was not

denied his Fifth Amendment or Sixth Amendment rights to counsel. Therefore certiorari should be denied.

CONCLUSION

For the above and foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

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ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

BY: Marvin L. White Jr.

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CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above Brief in Opposition to the following:

Clive A. Stafford Smith, Esquire
185 Walton Street, N.W.
Atlanta, Georgia 30303

This the 7th day of March, 1990.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.

AFFIDAVIT OF SERVICE OF PROCESS

I, Marvin L. White, Jr., being duly sworn, state the following:

1. I am a member of the bar of this Court and I am counsel for the Respondent in this action.

2. On March 7, 1990, I personally placed original and nine (9) copies of the enclosed Respondent's Brief in Opposition to the Petition for Writ of Certiorari to the Mississippi Supreme Court in the case of Robert S. Minnick v. State of Mississippi, No. 89-6332, in a package properly addressed to the Clerk of this Court, with first-class postage prepaid, and deposited the package in a mailbox under the exclusive control, care and custody of the United States Postal Service within the City and State of Jackson, Mississippi.

3. I placed a copy of said Brief in Opposition to the Petition for Writ of Certiorari to the Mississippi Supreme Court in an envelope properly addressed to Clive A. Stafford Smith, 185 Walton Street, N.W., Atlanta, GA 30303 first-class postage prepaid, deposited the envelope in a mailbox under the exclusive control, care, and custody of the United States Postal Service within the City and State of Jackson, Mississippi.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.

SWORN TO AND SUBSCRIBED BEFORE ME this, the 7th day of March, 1990.

Cassandra B. Carter
NOTARY PUBLIC

My Commission Expires:

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MIKE MOORE
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March 7, 1990

Honorable Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
One First Street, Northeast
Washington, D.C. 20453

RE: Robert S. Minnick v. State of Mississippi
No. 89-6332

Dear Mr. Spaniol:

Please find enclosed for filing the original and nine (9) copies of Respondent's Brief In Opposition and a copy of the Affidavit of Service of Process. Original of Affidavit of Service of Process is being sent under separate cover. By copy of this letter I am fowarding a copy this brief to counsel opposite.

Thank you for your assistance in this matter.

Very truly yours,

Marvin L. White, Jr.
Assistant Attorney General

MLW:jr/ds

Enclosures

cc: Honorable Clive A. Stafford Smith